

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 14-14B (SKANSKA USA),

Respondent,

Case No. 2-CB-63648

-against-

BIAGIO NICCHIA,

An individual.

-----X

**RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 14-14B, AFL-CIO'S REPLY BRIEF TO THE ANSWERING BRIEF OF THE
COUNSEL FOR THE ACTING GENERAL COUNSEL OF THE NATIONAL LABOR
RELATIONS BOARD REGION 2**

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Respondent INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 14-14B, AFL-CIO ("LOCAL 14") submits this reply brief in response to the answering brief filed by the Counsel for the Acting General Counsel of the National Labor Relations Board Region 2 (the "General Counsel") and in further support of LOCAL 14's filed exceptions, its petition to reverse the decision of Administrative Law Judge Steven Davis dated March 20, 2012 (the "ALJD") and to dismiss the Complaint in its entirety.

PRELIMINARY STATEMENT

In lieu of reiterating the Exceptions, Statement of the Case and the Statement of Facts herein, the Board's attention is respectfully directed to the Exceptions and Petition filed on April 13, 2012.

ARGUMENT

POINT I

THE ALJ DID NOT PROPERLY APPLY THE FACTS IN THIS CASE

A. The Fact that LOCAL 14 Does Not Operate an Exclusive Hiring Hall is a Significant Factor

In its Answering Brief, the General Counsel claims that Respondent LOCAL 14 incorrectly states that ALJ Davis' conclusion that the employer, Skanska, had delegated its hiring and firing authority to LOCAL 14 at the Second Avenue Subway construction project in New York City (the "Project") was based upon a finding that the union operated an exclusive hiring hall. However, that is exactly what ALJ Davis did. In his decision, ALJ Davis wrote:

Here, it is clear that the Respondent delegated its authority to hire and replace employees to the Union which is a typical arrangement in hiring hall situations.

(ALJD 5:40-45.)¹ In support of his decision, ALJ Davis cited Grason Electric Co., 296 NLRB 872 (1989). As accurately stated in LOCAL 14's Petition, Grason stands for the proposition that in the construction industry, "employers delegate the hiring process to the union through the operation of an exclusive nondiscriminatory hiring hall." 296 NLRB at 887. However, while it is undisputed that LOCAL 14 represents individuals employed in the construction industry, the union ***does not*** operate an exclusive hiring hall. Instead, as testified to by Business Agent Chris Confrey, union members have the ability to seek employment through the referral hall operated by the union but may also obtain employment by being requested by an employer or soliciting their own employment. Tr. 51:23-52:5.² Since LOCAL 14 operates a nonexclusive hiring hall, the union lacks the power of putting jobs out of reach of its members and employers, such as

¹ The citations refer to the pages and line numbers from the ALJD.

² "Tr." refers to the hearing transcript prepared in connection with the hearing held on January 30, 2012.

Skanska, “are at liberty to employ . . . whomsoever they see fit.” See Joint Exhibit 1 at pp. 2-3.³

Therefore, without the necessary component of an exclusive hiring hall, the ALJ’s rationale that LOCAL 14 controls the hiring and firing of Skanska employees is incorrect. (ALJD 5:4-45.)

**B. Skanska Did Not Delegate its Authority Over
the Hiring and Firing of Employees to LOCAL 14**

The General Counsel argues that ALJ Davis properly applied the facts when he concluded that Skanska delegated its authority to hire and fire LOCAL 14 members to the union. The actual facts as testified to by Business Agent Chris Confrey and BIAGIO NICCHIA at the hearing tell a different story. During his testimony, NICCHIA stated that “I was referred through a Union Hall” for the position as a locomotive operator on the graveyard shift at the Project in July of 2010. Tr. 32:11-19. Thereafter, as the parties stipulated, *Skanska* laid NICCHIA off and rehired him on April 6, 2011. Tr. 10:2-25. LOCAL 14 was not part of the process when Skanska decided to layoff NICCHIA at some point after his initial employment started. As relating to job referrals generally for the Project, on cross-examination, Business Agent Confrey confirmed that Skanska would provide him advance notice of the type of skilled workers it would need and he would refer them such workers as requested. Tr. 28:23-29:8. Such facts do not evidence an employer delegating its authority over the hiring and firing of employees to LOCAL 14 but instead reflect a process by which the union is used as a source for the procurement of skilled operators through its non-exclusive hiring hall. See Joint Exhibit 1 at pp. 2-3.

The testimony referenced in LOCAL 14’s Petition accurately reflects the content of an exchange between Business Agent Confrey, Regional Counsel and ALJ Davis during which the witness confirmed that a referred member to a job site could meet another LOCAL 14 member

³ “Joint Exhibit” refers to the exhibits submitted by the parties during the hearing held on January 30, 2012.

(such as a master mechanic), a corporate representative or even an employee who is represented by another union as his or her initial contact when reporting to work. Tr. 23:22-25:5. What the General Counsel and the ALJ failed to recognize is that LOCAL 14 has no control over the jobsite or the specific work instructions that an employed union member must follow once his or her employment starts. While NICCHIA testified that in all his years as a LOCAL 14 member he never met with an employer representative after being referred to a work site, this is not the case since the underlying collective bargaining agreement between Skanska and LOCAL 14 reiterates the principal that the employer maintains ultimate authority over its work force including the right “to employ and discharge whomsoever they see fit.” See Joint Exhibit 1 at pp. 2-3.

POINT II

THE EVIDENCE IN THE RECORD SUPPORTS LOCAL 14’S POSITION THAT NICCHIA WAS REPLACED ON THE PROJECT AS A RESULT OF THE HEARING OFFICER’S DECISION

In response to LOCAL 14’s argument that the union was motivated to replace NICCHIA as a result of the Hearing Officer’s decision, the General Counsel submits the following claims:

1. LOCAL 14’s true motivation in replacing NICCHIA on the Project was his expulsion from the union and not the Hearing Officer’s decision to Expel him pursuant to the Consent Decree.⁴
2. LOCAL 14’s decision to replace NICCHIA on the Project was to encourage union membership by discriminating against an employee because of his or her loss of membership.
3. LOCAL 14 cannot rely upon the Philadelphia Typographical decision because over six years had transpired from NICCHIA’s release from prison until his expulsion from the union.

⁴ The “Consent Decree” is the settlement document entered into between LOCAL 14 and the U.S. Attorney’s Office for the Eastern District of New York and so ordered by the Honorable Sterling Johnson on July 25, 2008. See Joint Exhibit 6.

A. LOCAL 14 Deferred to the Consent Decree's Disciplinary Process

Despite the General Counsel's comments to the contrary, the application of the disciplinary procedures provided for in the Consent Decree was a lawful intervening factor that cannot be discounted and should be focused upon when evaluating the steps taken by LOCAL 14 after it received the Hearing Officer's decision to permanently expel NICCHIA from union membership for having engaged in corrupt conduct as defined under the Consent Decree.

While relying upon counsel's email to LOCAL 14 in which Business Agent Confrey was advised to replace NICCHIA on the Project for being permanently expelled from the union, the ALJD does not acknowledge the process undertaken to expel this individual. Particularly, the Ethical Practices Attorney appointed by the Court brought charges against NICCHIA seeking his expulsion from LOCAL 14 for having engaged in criminal conduct that rose to the level of "corruption" as defined under the Consent Decree and NICCHIA was only expelled from LOCAL 14 after the Hearing Officer determined that he had engaged in corruption. Once this decision was issued, the email in question was transmitted to LOCAL 14. However, its transmission was only made *after* the Hearing Officer had rendered his decision in accordance with his authority under the Consent Decree. Had the Consent Decree not been in place, the EPA would not have had the authority to charge NICCHIA with corruption, and the Hearing Officer would not have had the authority to render his decision and expel NICCHIA from the union. Without this occurring, counsel's email would never have been sent and NICCHIA would not have been replaced on the Project. Accordingly, ALJ Davis' rationale that the Hearing Officer's decision was not "the intervening event which necessarily caused NICCHIA's replacement at work" is incorrect. (ALJD 4:15-20.)

B. LOCAL 14's Motivation was Not to Encourage Union Membership

The General Counsel also cites to case law that stands for the principal that the law presumes an unlawful motive (i.e., that LOCAL 14 sought to encourage union membership by discriminating against NICCHIA because of his loss of union membership) when a labor organization interferes with one's employment. See Radio Officers v. NLRB, 347 U.S. 17, 53 (1954); Carpenters Local 1102 (Planet Corp.), 144 NLRB 798, 800 (1963). In Radio Officers, the union manipulated its seniority list by reordering members as a result of their dues paying status. Such an action, the Supreme Court explained, caused discrimination since the union was coercing compliance with union obligations or practices that contravened one's employment rights. Radio Officers, 347 U.S. at 52. In this matter, however, LOCAL 14 did not seek to coerce NICCHIA into honoring a union obligation or practice. Instead, LOCAL 14 only acted in response to the Hearing Officer's decision that resulted in NICCHIA's permanent expulsion from the union. By not demanding from Skanska that the employee be replaced and since NICCHIA accepted the union's request for his replacement, the coercion and motivation required under Radio Officers is lacking.

Meanwhile, in Planet Corp., the Board found that a union did not discriminate against an employee when it sought to have the employer terminate the employee because the individual refused to pay a contractually required subsistence allowance to the union. 144 NLRB at 799, 802. While explaining that the underlying issue was the employee's failure to adhere to a contractual term, the Board stated that discrimination in employment would only occur under the NLRA if the action undertaken by the union or employer was to encourage or discourage union membership. 144 NLRB at 800. The Board went on to say that "in determining whether

discrimination, or an attempt to cause it, falls within the statutory condemnation, ‘it is the true purpose or real motive that constitutes the test.’ Id. This rationale is applicable to the instant matter.

Herein, and as explained in LOCAL 14’s Petition, action was only undertaken by LOCAL 14 *after* the Hearing Officer had rendered his decision. With this event having been taken first, LOCAL 14 was not motivated by NICCHIA’s union status but instead by the overall objective of the Consent Decree -- “[Eradicating] Corruption (as defined herein) and any organized crime influence within Local 14 while preserving the Local’s strength and autonomy as the bargaining agent and representative of its membership.” See Joint Exhibit 6 at pp. 2-3. It is respectfully submitted that the Consent Decree and its goal of eradicating corruption cannot and should not be dismissed nor ignored when considering LOCAL 14’s motivation in replacing NICCHIA on the Project.

C. The Timing Between NICCHIA’s Conviction and Expulsion is Irrelevant

The General Counsel submits an argument that since the length of time between NICCHIA’s conviction and the Hearing Officer’s decision to expel him exceeded six (6) years, LOCAL 14 cannot rely upon the Board’s decision in Philadelphia Typographical Union No. 2 Triangle Publications, 189 NLRB 829 (1971) to support its position that there was a legitimate reason to replace NICCHIA. It is respectfully submitted that such a contention should not be accepted because (1) the Board in Philadelphia Typographical never relied upon the time frame between the employee’s indictment, conviction and discharge as a relevant factor to its decision and (2) the rationale applied by the Board in this decision is extremely relevant to the instant action.

In Philadelphia Typographical the Board applied the following standard which is also applicable to this appeal -- *whether the union's interference with the employer/employee relationship might be construed as having a foreseeable consequence of encouraging union membership*. 189 NLRB at 830 (Emphasis added). As discussed in LOCAL 14's Petition as well as this Reply Brief, LOCAL 14 did not replace NICCHIA because he did not wish to be a member of the union or as punishment for refusing to become a member of the union. Instead, LOCAL 14's action of replacing NICCHIA was the result of the Hearing Officer's decision which was promulgated in accordance with his authority under the Consent Decree. Union membership is neither encouraged nor discouraged by LOCAL 14 as a result of the Hearing Officer's decision to permanently expel NICCHIA. Instead, NICCHIA's fate as a union member is intertwined with the criminal conduct for which he plead guilty to, a finding that said conduct was also corruption pursuant to the Consent Decree and that his expulsion was thereby warranted. As explained during the course of the hearing before ALJ Davis, all of these factors, including NICCHIA only having standing to appeal the Hearing Officer's decision (which he did not) evidence that LOCAL 14 was not a party to the hearing process and only replaced NICCHIA in order to further the goal of the Consent Decree.

CONCLUSION

Accordingly, LOCAL 14 respectfully requests that ALJ Davis' decision dated March 20, 2012 be reversed, the relief granted therein denied and the Complaint dismissed in its entirety.

Dated: Tarrytown, New York
May 9, 2012

Respectfully submitted,

BRADY McGUIRE & STEINBERG, P.C.

A large, stylized handwritten signature in black ink, which appears to read "James M. Steinberg". The signature is written over a horizontal line and is partially enclosed by a large, loopy circular stroke.

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